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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 236

HENRY M. LADREY AND EVA W. LADREY,
Petitioners,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

JAMES R. KIRKLAND,
ROBERT I. MILLER,
JOSEPH A. MCMENAMIN,
Counsel for Petitioners.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The petitioners, Henry M. and Eva W. Ladrey, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered May 20, 1946 (R. 71), affirming petitioners' conviction for bribery under Title 22, Section 701, in the D. C. Code (1940).

Opinion Below

The opinion in the Court of Appeals is not yet reported but is set out in full in the Record at page 70.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 A of the Judicial Code as Amended by the Act of February 13, 1925 (28 U. S. C. A. 347) and Sec. 269, as amended

(28 U. S. C. A., Sec. 391). See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

Questions Presented

1. The Court erred in refusing to direct a verdict of not guilty as to the defendant, Henry M. Ladrey, at the conclusion of the government's case and at the end of the whole case.

2. The Court erred in admitting testimony concerning other offenses for which the defendants were not on trial.

3. The Court erred in permitting a government witness to testify to alleged statements made by the defendant, Eva W. Ladrey, out of the presence of the co-defendant, Henry M. Ladrey.

4. The court erred in allowing improper argument to the jury by the Assistant United States Attorney prosecuting the case.

Statute Involved

The pertinent provisions of Title 22, Section 701, D. C. Code (1940) are as follows:

> "Whoever promises, offers, or gives or causes or procures to be promised, offered, or given, any money or other thing of value, or makes or tenders any contract, undertaking, obligation, credit, or security for the payment of money, or for the delivery or conveyance of anything of value, to any executive, judicial, or other officer, or to any person acting in any official function, or to any juror or witness, with intent to influence the decision, action, verdict, or evidence of any such person on any question, matter, cause, or proceeding or with intent to influence him to commit or aid in committing, or to collude in or allow any fraud, or make any opportunity for the commission of any fraud, shall be fined not more than five hundred dollars, or be im-

prisoned not more than three years, or both." (Mar. 3, 1901, 31 Stat. 1330, ch. 854, Title 861).

Statement

Dr. Henry M. Ladrey, a physician, engaged in the private practice of medicine in the District of Columbia, and his wife, Eva W. Ladrey, a government employee working in the Department of Justice, were indicted, tried and convicted of bribery. A motion for a new trial was filed and argued but was denied by the Trial Justice. Thereupon, the said defendants were sentenced to serve one to three years, execution suspended and they were placed on probation. From this judgment they appealed.

The testimony in the trial showed that one Hazel Queenan had been the complaining witness in an abortion case then pending against the appellant Henry M. Ladrey. (R. 3, 10). This fact was stipulated by counsel for both sides and upon said stipulation the indictment in the pending abortion was admitted into evidence. The said indictment showed on its face that Hazel Queenan was the complaining witness in that case. On January 7, 1944, the appellant, Eva W. Ladrey was arrested in the home of Hazel Queenan, after allegedly attempting to induce the said Hazel Queenan to withdraw the charges against her husband, Dr. Ladrey, and leave town. Appellant, Dr. Henry M. Ladrey, was not with his wife at the time of her arrest. As the detectives rode around the neighborhood they found appellant, Dr. Henry M. Ladrey, standing by his car in conversation with a taxi driver. There was evidence that the taxi had collided with the doctor's automobile (R. 33, 40). There was some testimony that appellant Dr. Ladrey had driven his wife to the vicinity of Hazel Queenan's house on the evening in question, but this was denied by the appellant Dr. Ladrey. There was no evidence by either side that appellant Dr.

Ladrey knew where his wife was going at that time or what she was going to do and he denied that he had any knowledge or intent to aid, abet, or engage in any bribery.

When Hazel Queenan was on the witness stand she was permitted to testify in detail to all of the alleged actions of the appellant Dr. Ladrey in performing an abortion upon her. The trial court permitted this testimony on the theory that it was necessary for the government to show that the said Hazel Queenan was a "material" witness in the pending abortion case, even though it had already been stipulated previously and admitted as a fact in evidence that she was a witness in that case, and the indictment in said case, showing her name thereon as the complaining witness, was in evidence and had been read to the jury (R. 3, 4, 5, 6).

The prosecutor in his argument to the jury, in commenting upon the character testimony adduced in behalf of the appellants, mentioned certain "bankers" who had been apprehended several years ago who were supposed to be of good character. This had nothing to do with any of the evidence in the bribery case. Counsel for appellants objected to the improper argument and asked that a mistrial be declared, but the motion was denied. Counsel also made a motion at the end of the government's case, and again at the conclusion of the whole case, for a directed verdict of not guilty in behalf of the appellant, Dr. Ladrey, on the grounds that there was no evidence that said appellant had any guilty knowledge or guilty intent of the alleged bribery. These motions were also denied.

Specification of Errors to Be Urged

I

There was no evidence in the government's case and no evidence in the whole case that the defendant, Henry M. Ladrey, had anything to do with the alleged crime. The

only circumstance against him was the disputed testimony that he transported the co-defendant, Eva W. Ladrey, to or near the scene of the alleged offense. The trial court erred in refusing to direct a verdict of not guilty as to the defendant, Henry M. Ladrey, because in order to impute the necessary elements of knowledge and intent the jury would have to draw an inference from an inference, which would be speculation and not allowed according to law.

II

During the trial the court permitted the prosecuting witness to testify in great detail concerning an alleged act of abortion for which the defendants were not then on trial, the instant charge being bribery of the said complaining witness. Such testimony in detail was totally unnecessary because counsel for both sides had previously entered into a stipulation acknowledging as a fact that the complaining witness in the bribery case was also the complaining witness in the alleged abortion case and the indictment of that case was admitted into evidence.

III

Government witnesses were allowed to testify that the defendant, Eva W. Ladrey, made certain statements out of the presence of the co-defendant, Henry M. Ladrey; said statements being hearsay so far as Henry M. Ladrey was concerned and could be admissible only against Eva W. Ladrey.

IV

The prosecuting attorney was permitted to argue to the jury about matters that had no bearing whatever to the facts of the case on trial and could not have any effect except to unduly influence the minds of the jury against the defendants.

Reasons for Granting the Writ

The Court erred in refusing to direct a verdict of not guilty as to the defendant Henry W. Ladrey at the conclusion of the government's case and at the end of the whole case.

The only evidence in the whole case concerning the defendant, Henry M. Ladrey, was testimony that he had taken the co-defendant in his automobile to, or near the home of the complaining witness on the night in question. There was no other evidence whatever connecting him with the alleged bribery. The appellant, Henry M. Ladrey, contends that this meager testimony is not sufficient to sustain a conviction against him because there was no proof that he had any knowledge that the co-defendant was going to the home of the complaining witness to offer her a bribe, and further, there was no proof that he had any *intent* to join in, engage in, aid or abet in the alleged enterprise. In fact, *all* of the evidence was that he did not know where his wife, the co-defendant, was going or what she was going to do (R. 20, 23, 31, 32).

The trial court insisted that the jury should be allowed to draw inferences from the disputed fact that because Henry M. Ladrey drove his wife to the scene, he had both knowledge and intent to join in the alleged crime. Knowledge and intent are not the same thing. Knowledge is "information as to a fact; the act of knowing; clear perception of the truth; firm belief; information." Intent is "the design, resolve or determination with which a person acts." *Witters* v. *United States*, 70 App. D. C. 316, 319 (1939).

If it were a conceded fact that Dr. Ladrey drove Mrs. Ladrey to the scene (the point was denied by Dr. Ladrey on the stand R. 33), in order to convict him the jury would

have to derive the following inferences from that circumstance:

a. That he knew where she was going.

b. That he knew why she was going there.

c. That he did not object to her going.

d. That he took her there for the purpose of offering a bribe.

Thus it can be seen that it was necessary for the jury to draw four different inferences from one circumstance, the first two pertaining to guilty knowledge and the latter two pointing to guilty intent. It is urged that the latter two inferences could not be logically drawn unless the former two were established as a proved fact. But the former two, namely, those concerning guilty knowledge, are not proven facts, but are inferences themselves, to be derived from a circumstance. Hence we have an inference based upon an inference, which the law does not allow.

Inferences and deductions which the jury may be permitted to draw must be based upon some substantial evidence tending to establish the guilt of the defendant. Otherwise to permit the jury to convict upon inferences and deductions would merely mean to permit the jury to speculate as to the guilt of the defendant. This sort of procedure the courts uniformly condemn. *Sleight* v. *United States*, 65 App. D. C. 203.

In order to warrant a conviction on circumstantial evidence, it is necessary to prove the circumstantial facts and there must be no uncertainty as to the facts from which the controlling inferences are to be drawn. Such facts must be proved by direct evidence. Circumstantial evidence from which an inference of this existence may be drawn by the jury is not sufficient, and one presumption of fact cannot be based on another. There cannot be an inference

derived from an inference. *Spalitto* v. *United States,* 39 F. (2) 782. While natural inferences can be drawn from circumstances to prove guilt, such inferences cannot be substituted for the circumstances themselves. *Gerson* v. *United States,* 25 F. (2) 49.

In the instant case there was uncontroverted evidence that Dr. Ladrey was engaged in treating a patient in the same neighborhood as the home of the complaining witness (R. 33, 39, 44, 45, 59, 60) at approximately the same time that the detectives arrested his wife at the house of the complaining witness. There was also evidence that after treating the patient, a Mrs. Long, he had an automobile accident in the nearby vicinity and was engaged in conversation with the driver of the other vehicle when the detectives came up to him in the street (R. 33, 40). His treating a patient is a reasonable explanation for his presence in the neighborhood at the time and bears strongly on the hypothesis of innocence. There was no direct evidence that he knew where his wife was or what she was doing at that time, much less any direct evidence that he knew his wife was going to the home of the complaining witness or that she was going there for the purpose of offering a bribe.

Circumstantial evidence may warrant a conviction in a criminal case provided it is such as to exclude every reasonable hypothesis but that of guilt of the offense imputed to the defendant; or, in other words, the facts proved must all be consistent with and point to his guilt *only* and be inconsistent with his innocence. The hypothesis of guilt should flow naturally from the facts proved and be consistent with them all. If the evidence can be reconciled either with the theory of innocence or of guilt, the law requires that the defendant be given the benefit of the doubt and that the theory of innocence be adopted. *Vernon* v. *United States,* 146 F. 121; *Kirkwood* v. *United States* 256 F. 825.

In the instant case there was no probative evidence to be submitted to the jury concerning the defendant Dr. Henry M. Ladrey. There was merely evidence that he drove his wife to a certain place. At best this could only prove that he did drive her there and nothing else. There was also evidence that he treated a patient at approximately the same time in the immediate vicinity.

Whenever a circumstance relied on as evidence of criminal guilt is susceptible of two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value, even though from the other inference, guilt may be fairly deductible. Mere suspicion is not sufficient on which to base a conviction. *Turinette* v. *United States*, 2 F. (2) 15, 17. Evidence creating a mere probability of guilt is not sufficient to sustain a conviction; much less is evidence which gives rise to a mere suspicion or conjecture of guilt. *Kassin* v. *United States*, 87 F. (2) 183.

Even if the testimony had shown that Dr. Ladrey knew that his wife was going to bribe the complaining witness (although such testimony was not adduced at any part of the trial) it still would not have been any proof that he approved of his wife's actions or had any control over them, or that he intended to willingly aid her in them. It has been held that evidence, which at the most showed only that a defendant associated with a codefendant convicted of the crime, and that he had knowledge that a crime was to be, or had been, committed, was insufficient to sustain a conviction. *O'Brien* v. *United States*, 299 F. 568.

Both knowledge and intent are separate essential elements of this crime, which must be proved in order to sustain a conviction against the defendant Dr. Henry M. Ladrey. But Dr. Ladrey denied both knowledge and intent immediately upon his arrest, as shown by the testimony of the government's own witnesses (R. 20, 23), and he also

reiterated his denial of both knowledge and intent when he took the stand in his own behalf (R. 40, 41, 42).

Facts cannot be proved by a circumstance merely consistent with their existence. *Fuguay* v. *State*, 114 So. 892, 22 Ala. App. 1264. Nor can facts be established by not believing witnesses who deny them. *State* v. *Poplowski*, 133 A. 671, 104 Conn. 493.

The trial court denied a motion for a directed verdict made by counsel in behalf of the defendant Dr. Henry M. Ladrey at the conclusion of the government's case. This motion was renewed at the end of the whole case and was again denied. It is respectfully urged that prejudicial error occurred in allowing the case of the defendant Henry M. Ladrey to be submitted to the jury without sufficient proof, but merely on speculation and conjecture.

II

The Court Erred in Allowing into Evidence Testimony Concerning Other Offenses for which the Defendants Were Not on Trial.

At the beginning of the trial, counsel for the appellants, defendants below, entered into a stipulation with the prosecuting attorney, whereby it was admitted into evidence that an indictment, the original document of which was produced in open court, was then pending against the defendant, Dr. Henry M. Ladrey, charging him with having performed an abortion against the complaining witness, Hazel Queenan. It was also stipulated that the said Hazel Queenan was a witness in the abortion case still pending. (R. 3, 4, 5).

The appellants contend that this stipulation was sufficient for the government to proceed with the trial of the instant case, charging bribery of the said complaining witness, Hazel Queenan, because the stipulation established as a

fact that the said Hazel Queenan was a witness in a case that was still pending. Under the wording of the bribery statute (D. C. Code (1940), 22-701) this was all that was necessary to be proved by the government to establish that phase of their case. Nevertheless, the trial court permitted the prosecutor to interrogate the witness Hazel Queenan on the stand, concerning all of the details of the alleged abortion, in spite of the fact that it was already admitted and made part of the evidence that she was a witness in the other case. (R. 4, 5).

It is a well-established principle of law that upon the trial of an indictment, charging a specific crime against the accused, it is not competent for the prosecution to put in evidence proof tending solely to show that the defendant had been guilty of other offenses. *Laughlin* v. *United States,* 67 App. D. C. 353; *Ryan* v. *United States,* 26 App. D. C. 74.

It is admitted that there are exceptions to this general rule, which, according to the decisions, are:

When the evidence of other crimes tend to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan; (5) the identity of the person charged. *People* v. *Molineaux,* 168 N. Y. 264, 61 N. E. 286; *Martin* v. *United States,* 75 U. S. App. D. C. 399.

The detailed testimony related on the stand in the instant case by the witness Hazel Queenan (R. 10, 11, 12) concerning the placing of her upon a certain table in the doctor's office, the use of certain instruments upon her person, her subsequent illness and her admission to a hospital for treatment, had no bearing whatever upon the charge of bribery, for which the defendants were on trial. Such detailed statements of the witness could only have tended to humiliate and disgrace the defendant Dr. Henry M. Ladrey and his

wife, the co-defendant, Eva W. Ladrey; the testimony was not necessary to the inquiry on hand, and was likely to create an adverse and prejudicial feeling against the defendants in the minds of the jury. *Silverberg* v. *United States* 4 F. (2) 908, 909; *Dyar* v. *United States,* 186 F. 617; *Taliaferro* v. *United States* 213 F. 25.

At another part of the trial a different witness, one Edgar E. Scott, was permitted to touch upon the pending abortion case in his testimony (R. 25, 26). It is contended that this was also improper because it may have had a cumulative prejudicial effect against the defendants in the minds of the jury.

The trial court insisted that the reason it was permissible for the government to bring out the details of the abortion case from the witness, Hazel Queenan, was because it was necessary for the government to show that she, the said Hazel Queenan, was a "material witness" in the pending abortion case. The wording of the statute does not bear out this theory. It merely states "any witness." The action of the trial court was objected to (R. 7, 8, 9) because it had already been admitted into evidence that an indictment was pending and that Hazel Queenan was a witness in that case. Her testimony concerning the full details of the abortion case, for which the defendant, Dr. Ladrey, was not then on trial, was totally unnecessary as government proof against the defendants on the bribery charge; it should not have been allowed, and it is respectfully urged that prejudicial error occurred in allowing such testimony to be received.

III

The Court erred in permitting government witnesses to testify to alleged statements made by the defendant, Eva W. Ladrey, out of the presence of the co-defendant, Henry M. Ladrey.

The record shows that the trial court permitted police officers to testify that Eva W. Ladrey made statements out of the presence of the co-defendant, Henry M. Ladrey, following her arrest (R. 19, 23) to the effect that her husband and co-defendant, Henry M. Ladrey, brought her to, or near, the scene of the alleged crime. The statements were objected to and exceptions noted (R. 43, 44, 65, 67).

Such statements were admissible only against Eva W. Ladrey. They were hearesay in character and had no probative force against the co-defendant, Henry M. Ladrey. By virtue of being remote and not spontaneous, they did not come within the exception of the rule of the *res gestae.* On the other hand, there was neither a charge of conspiracy in the indictment, nor the showing of any evidence from which an alleged conspiracy could be drawn. The trial court should have directed a verdict in favor of the defendant, Henry M. Ladrey, in the absence of positive evidence to connect him with the crime charged.

The appellate court committed error in contending that the jury was justified in regarding inconsistent statements as "in themselves tending to show guilt and the *existence of a conspiracy*" (italics supplied). The court further erred in holding that it was immaterial that the indictment did not specifically charge that the defendants had conspired. The case of *American Fur Company* v. *United States,* (2 Pet. 358), relied upon as authority for this position by the court, involved statements made by an agent in connection with libel proceedings brought to confiscate liquor. The case of *Wiborg* v. *United States,* 163 U. S. 632,

involved the illegal fitting out of a military expedition for Cuba in violation of the neutrality laws of the United States and also had no bearing upon the instant case.

In a local murder case, statements made by the wife out of the presence of her husband were properly excluded by the Court. *Lomax* v. *United States,* 37 App. D. C. 414, 1911. In another local case, the court was careful to point out that no declarations should be received in evidence against a co-defendant unless there was first some evidence tending to prove a conspiracy which implicated the co-defendant, *United States* v. *Gunnell,* 1886, 5 Mackey (16 D. C.) 196. See also *Minner* v. *United States,* 57 Fed. (2) 506, C. C. A. 1932.

In the case of *Itaw* v. *United States,* 223 Fed. 25, 1915, C. C. A. 9th, the court stated the rule as follows:

> "Where two defendants charged with crime, are tried jointly, a statement made by one of them is admissible in evidence against him but not against his co-defendant unless made in his presence and assented to by him either actually or impliedly. *Sparf & Hansen* vs. *United States,* 156 U. S. 51, 58, 715, 15 Sup. Ct. 273, 39 L. Ed. 343; *Alsabrooks* v. *State,* 52 Ala. 24; *Johnson* v. *State,* 70 Ga. 725; *Brandt* v. *Com.* 94 Pa. 290; *State* v. *Cram,* 65 Vt. 650, 32 Atl. 502; *Com.* v. *Bishop,* 165 Mass. 148, 42 N. E. 560."

To like effect was the court's ruling in the case of *Tresca* v. *United States,* 183 Fed. 786, 1910 C. C. A. 2d, wherein two persons were jointly indicted for uttering counterfeit money. A statement of one defendant out of the presence of the other alleging that the second had participated in the alleged crime was held to have been erroneously received by the trial court. The Court pointed out:

> "There was error therefore in the denial of the motion to discharge him on the ground that there was no evidence to connect him with a crime."

The rule excluding such statements made by one co-defendant out of the presence of the other has been followed in the state courts.[1] Accordingly it is submitted that the trial court erred in receiving such testimony here.

IV

The Court Erred in Allowing Improper Argument to the Jury by the Assistant United States Attorney Prosecuting the Case.

In his argument, the prosecuting attorney, in commenting upon the previous good reputation of the defendants, mentioned certain "bankers" who had been charged with crime (App. 66, 67, 68, 69). The case on trial had nothing to do with any "bankers" and the argument was far removed from any of the facts of the case. This was unfair argument and should not have been allowed, because it may have unduly influenced the jury against the defendant. *Berger* v. *United States,* 295 U. S. 78, 88.

Conclusion

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

JAMES R. KIRKLAND,
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Counsel for Petitioners.

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[1] *Bowling* v. *Com.*, Ky. 1910, 126 S. W. 360.
State v. *Beebe,* Wash. 1912, 120 P. 122, 66 Wash. 463.
McClelland v. *State,* Md. 1921, 114 A. 584, 138 Md. 533.
Pl. v. *Coltra,* Cal. 1931, 2 P. (2d) 35, 115 Cal. App. 539.
St. v. *Archibald,* Ia. 1927, 215 N. W. 258, 204 Ia. 406.
Williamson v. *State,* Ala. 1938, 186 So. 785.
State v. *Perelli,* Conn. 1939, 5 Ott (2d) 705, 125 Conn. 321.
McPhee v. *Pl.,* Colo. 1940, 98 P. (2d) 997, 105 Colo. 413.
Pl. v. *Vaccaro,* N. Y. 1943, 42 N. E. (2d) 472, 288 N. Y. 170.